United States v. Rios, 02-10241

Kleinfeld, Circuit Judge, dissenting:

I respectfully dissent.

The disposition says that the violation of the no-contact-with-children provision "constitutes an adequate basis for the district court's decision, [so] we do not reach the other issues raised by the appellant."[1] That is illogical. The judge sent Rios to prison for five years, not only for brushing by a boy as he entered, and the boy left, the K-Mart men's room, but also for possessing sexually oriented material. If a judge sentences a man to five years for two separate wrongs, it is quite possible that the judge would not have imposed so harsh a sentence for only one of the wrongs. We do indeed have to reach appellant's other issues.

In my view, the prohibition on the possession of sexually stimulating material that Rios was held to have violated itself violated his First Amendment right to freedom of thought and speech and his Fifth Amendment right to fair

[1] Maj. op. at 6.

notice of what, on pain of imprisonment, he was forbidden to do.[2] Much of the material he possessed is, on its face, entirely non-sexual, such as pictures of fully-clothed children and adults picking cactus fruit on a summer field trip, and videotapes of the most innocent G-rated comedies and cartoons, such as "The Flintstones." The probation officer dressed these up in her testimony with misleading characterizations, such as that the cover of "The Flintstones" box "depicts a half-naked little boy"[3] and that a picture of youths on a swim team wearing bathing suits showed "children in their underwear."[4]

Rios may have found these materials sexually stimulating. If that is so, however, it is hard to imagine what he would not have found sexually stimulating. His conditions of release required that he not possess "any sexually stimulating . . . material as deemed inappropriate by his probation officer," or patronize any place

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[2] See Free Speech Coalition v. Ashcroft, 535 U.S. 234, 252-53 (2002) (rejecting the rationale that the government may prohibit virtual child pornography because it "whets the appetites of pedophiles"); United States v. Guagliardo, 278 F.3d 868, 872 (9th Cir. 2002) (holding that a probationer has a due process right to conditions of supervised release that are sufficiently clear to inform him of what conduct will result in his being returned to prison).

[3] ER 38.

[4] ER 39.

where such material is available.[5] His probation officer interpreted the materials described above as sexually stimulating based on her understanding that Rios found them sexually stimulating. But if pictures of a swim team and of G-rated movies are deemed sexually stimulating materials under Rios's conditions of release, then he is barred not just from erotic bookstores but also from the grocery store. So interpreted, the condition is unconstitutionally vague, and unconstitutional because it is impossible to comply with it and his imprisonment would depend on the unchanneled discretion of his probation officer and the judge.[6]

The other condition, that Rios "shall not have contact with children under the age of 18 without prior written permission,"[7] the one the majority rests its disposition on, is also unconstitutionally overbroad as interpreted in this case. If all it meant was to stay out of schoolyards, not babysit, etc., then the condition would be appropriate. But the decisions that saved similar conditions from

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[5] ER 10.

[6] Guagliardo, 278 F.3d at 872; see also United States v. Loy, 237 F.3d 251, 266 (3d Cir. 2001).

[7] ER 10.

constitutional challenge did so by interpreting them to exclude "accidental or unavoidable contact with minors in public places."[8] In this case, Rios had incidental contact with a boy as the boy was leaving the K-Mart bathroom. He may have been trying to look at the boys in the bathroom, but nothing in the record indicates that he found one there.

The majority says that Rios "admitted purposely bumping into a child exiting the bathroom," which is what the probation officer alleged in her petition.[9] But as with the "half-naked little boy" and the "children in their underwear," the probation officer's petition misled the district court (and the majority). When she testified at the evidentiary hearing, the probation officer was asked, "Did he say whether he brushed against him accidentally, or whether it was intentional." She answered,

> He didn't say that, but what his thought was, he said, he thought that that was kind of interesting, and he was sexually stimulated by them. But again, he did say that he went with the intent of getting–of going into the bathroom to see a child to get sexually stimulated. . . . He indicated that he may touch a child.

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[8] See, e.g., Loy, 237 F.3d at 269; United States v. Paul, 274 F.3d 155, 166 (5th Cir. 2001) (citing Loy, 237 F.3d at 269).

[9] Maj. op. at 3 (citing ER 16).

This is not an admission that Rios's contact with the boy who was exiting the bathroom was anything more than accidental or unavoidable contact. In order for the prohibition to pass constitutional muster, Rios's brush against the child cannot count as a violation.[10]

[10] See Paul, 274 F.3d at 166 (interpreting a prohibition on indirect contact with minors to exclude "casual or incidental encounters").